No. 93-634

Supreme Court, U.S.
FILED
NOV 12 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WASHINGTON MILLS ELECTRO MINERALS CORP.,
WASHINGTON MILLS CERAMIC CORPORATION,
JOHN T. WILLIAMS and PETER WILLIAMS,
Petitioners,

v.

DELONG EQUIPMENT COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF IN OPPOSITION

WILLIAM E. SUMNER
Counsel of Record

NANCY BECKER HEWES
STEPHEN J. ANDERSON
DAVID A. WEBSTER

SUMNER & HEWES
Suite 700, The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 588-9000

Attorneys for Respondent DeLong Equipment Company

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Petitioners' Questions Presented are misleading, premised on academic exegesis bearing no relationship to the record in this case. The first Question invokes a purported "*per se* rule against resale price maintenance." But the per se rule of Sherman Act section 1 liability forbids more than just "resale price maintenance." It forbids price fixing. This case is about price fixing.

Petitioners' Questions Presented are premised on factual errors as well. The record in this case does not present the issues Petitioners press on this Court. Petitioners represent that "there is no . . . evidence, of an agreement with any distributor on the distributor's resale prices," but the record shows (and the Court of Appeals found) that the purpose of Petitioners' conspiracy was to support artificially inflated resale prices charged by co-conspirator BCS. Contrary to Petitioners' assertion that the conspiracy was "only an agreement on the wholesale prices the *manufacturer* would charge to other distributors" (emphasis in original), Petitioners fixed, and intended to fix, much more than just the price charged to other distributors. The conspiracy was expressly designed to peg resale prices. Petitioners' elaborate anticompetitive scheme, which included nonexistent products, false labeling, unreported kickbacks to offshore Bahamian bank accounts and—most importantly—fixed, artificially inflated resale prices, would have been meaningless unless the ultimate purchaser, a major defense contractor, paid an inflated price.

Petitioners' first Question Presented asserts implicitly that this case is a proper vehicle for deciding between per se liability and rule of reason liability. But the only plausible explanation for Petitioners' conspiracy was to fix prices. Even if this Court is inclined to consider whether the per se rule or the rule of reason should govern price fixing or any part of it, this is the wrong case. There is no possible pro-competitive explanation for Petitioners'

conduct. Petitioners' framing of the issues, and sterile, clinical analysis of their conduct, borders on cynicism.

Contrary to assertions in the second Question Presented, the record contains "proof of harm to market competition." The record is also replete with evidence of DeLong's "inability to compete by selling alternative brands." The jury was charged to find such evidence, and did so, and the Court of Appeals found the jury's verdict well supported by the record.

Respondent DeLong Equipment Company (hereinafter "DeLong")[1] respectfully takes issue with Petitioners' (hereinafter "Washington Mills")[2] Questions Presented.

---

[1] Pursuant to this Court's Rule 29.1, DeLong shows that it has no parent company and no subsidiary.

[2] Petitioners are Washington Mills, its principals and affiliates. Their co-conspirators (BCS and its principals) settled and were dismissed after the first appeal to the Eleventh Circuit, and are not parties to this Petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
ARGUMENT	4
I. PETITIONERS REQUEST REVIEW OF QUESTIONS NOT SUPPORTED BY THE FACTS, AND MISREPRESENT THE FACTS OF RECORD.	4
II. PETITIONERS' PER SE ISSUE IS NOT WORTHY OF REVIEW.	8
A. *Because Petitioners Had No Economic Justification for Fixing Prices, This Case Offers No Reason To Consider Abandoning the Per Se Prohibition Against Price Fixing.*	8
B. *Petitioners Present No Important Question of Law Which Should Be Resolved by This Court.*	10
C. *Application of the Per Se Rule Is Consistent With the Decisions of This Court and the Courts of Appeals.*	16
III. PETITIONERS' ANTITRUST INJURY ISSUES DO NOT MERIT REVIEW.	21
A. *DeLong's Lost Profits "Flow From That Which Makes Petitioners' Conduct Unlawful."*	23
B. *DeLong's Injury Reflects Anticompetitive Effects.*	25
C. *DeLong Suffered Injury In Fact.*	27
IV. CONCLUSION.	28

TABLE OF AUTHORITIES

Case Authority	Page
AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203 (10th Cir. 1982)	20,21
Albrecht v. The Herald Co., 390 U.S. 145 (1968)	17
Anago, Inc. v. Tecnol Med. Prods., Inc., 976 F.2d 248 (5th Cir. 1992), *petition for cert. pending*	25
Atlantic Richfield Co. v. USA Petro. Co., 495 U.S. 328 (1990)	24,25,26
Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946)	22
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	24
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. ___, 125 L.Ed.2d 168 (1993)	4,11
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	23
Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1984)	4,9,17,18,19,24
Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974)	20,21
Carlson Machine Tools, Inc. v. American Tool, Inc., 678 F.2d 1253 (5th Cir. 1982)	9
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)	24
Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)	16
Eastman Kodak Co. v. Southern Photo Mats. Co., 273 U.S. 359 (1927)	22
Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 459 F.2d 138 (6th Cir. 1972)	27
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	6

Table of Authorities Continued

	Page
FTC v. Ticor Title Ins. Co., 504 U.S. ___, 119 L.Ed.2d 410 (1992)	10
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	22
Lewis Serv. Ctr., Inc. v. Mack Trucks, Inc., 714 F.2d 842 (8th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984)	20,21
Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	24
Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)	3,16,17,18,21,24
NCAA v. Board of Regents, 468 U.S. 85 (1984)	26
NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951)	23
Palmer v. BRG of Georgia, 498 U.S. 46 (1990)	16,19
Pennsylvania Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985)	20,21
Rice v. Sioux City Mem. Park Cem., Inc., 349 U.S. 70 (1955)	11
Ross v. Moffitt, 417 U.S. 600 (1974)	10
Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988)	14
Seaboard Supp. Co. v. Congoleum Corp., 770 F.2d 367 (3d Cir. 1985)	20
Simpson v. Union Oil Co., 377 U.S. 13 (1964)	17,22,25
Sun Oil Co. v. Vickers Ref. Co., 414 F.2d 383 (8th Cir. 1969)	20
Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990)	22
United States v. Colgate & Co., 250 U.S. 328 (1919)	17

Table of Authorities Continued

	Page
United States v. ITT Cont. Baking Co., 420 U.S. 223 (1974)	23
United States v. Parke, Davis & Co., 362 U.S. 29 (1960)	17
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	19,26
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	22
Zoslaw v. MCA Distrib. Corp., 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983)	20
Supreme Court Rules	
Rule 10.1	10
Rule 15.1	4
Rule 29.1	ii
Other Authority	
P. Areeda, *Antitrust Law* (1989)	8,19
P. Areeda, *Antitrust Law* (1992 Supplement)	20
W. Prosser & W. Keeton, *Torts* (5th ed. 1984)	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-634

WASHINGTON MILLS ELECTRO MINERALS CORP., WASHINGTON MILLS CERAMIC CORPORATION, JOHN T. WILLIAMS and PETER WILLIAMS,

Petitioners,

v.

DELONG EQUIPMENT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF IN OPPOSITION

The trial court, jury and Court of Appeals all recognized that Petitioners and one of their distributors conspired to fix prices, purposefully to inflate the prices paid by the ultimate purchaser. Blatant, consensual vertical price fixing such as this is per se illegal. Because DeLong threatened to expose the conspiracy, Petitioners terminated its distributorship, thwarting DeLong's ability to compete. This is antitrust injury. Petitioners' conduct admittedly had no possible pro-competitive justification, and application of the per se rule against price fixing on these facts in no way threatens legitimate, beneficial competition. The judgment in DeLong's favor should stand.

STATEMENT OF THE CASE

This case is a paradigm of what Congress intended in providing for private enforcement of the federal antitrust laws, except for the long delay in its resolution. It has been pending nearly eight years. It has been tried twice. It has engendered four published decisions by the Eleventh Circuit Court of Appeals, each favoring DeLong. In 1990—after the Court of Appeals reversed summary judgment, ordered this case to trial, and denied rehearing en banc—this Court denied review of the primary issue Petitioners again raise in this application.[3] 494 U.S. 1081 (1990). Since the Petition in No. 89-1362, a jury has awarded a verdict for Sherman Act damages against Petitioners, and the Eleventh Circuit found substantial evidence to support the verdict, again denying en banc rehearing. The Court of Appeals carefully considered and rejected every argument raised by Petitioners, often on evidentiary grounds.

For the first time in this entire litigation, Washington Mills acknowledges that it participated in a price-fixing conspiracy. Petitioners admit, as they must after the jury's verdict and the Eleventh Circuit's affirmance, that they and co-conspirator BCS claimed false "special" qualities for generic abrasive media; that they agreed upon and implemented artificial prices for "special" media; that they attempted to enlist DeLong in their overpricing scheme, promising there "was plenty of money in it for both of us"; that, having been rebuffed, they first protected their artificial price by preventing DeLong from bidding, keeping it in the dark as to the "special" designation of media

[3] The sole Question Presented by the earlier Petition, which as Petitioners concede (Pet. at 8) is virtually identical to the first Question Presented here, was framed as follows: "Whether in the absence of an agreement to set, maintain or control the **resale** price of the product, a manufacturer's alleged agreement with one of its distributors to establish the manufacturer's **wholesale** price to other distributors constitutes vertical price-fixing in *per se* violation of Section 1 of the Sherman Act?" (emphases in original)

destined for Pratt, and then jointly established and charged Respondent and other distributors to Pratt an artificial wholesale price for "specials"; that they concocted a kickback arrangement by which Washington Mills made clandestine payments[4] into an offshore account in the name of a fictitious nominee of BCS; and that DeLong was terminated because its constant challenge to the artificial "special" designation, and the inflated prices foisted upon Pratt, threatened the very existence of Petitioners' price fixing scheme.

Washington Mills does not mention two additional incidents confirming unequivocally that it conspired to fix prices. BCS did not act alone in creating the artificial price of "special" media. "At an August, 1983 meeting at Pratt's East Hartford, Connecticut plant between representatives of Washington Mills and Pratt, the Washington Mills personnel present gave Pratt the Washington Mills designation of 'P & W special[s].' " Pet. App. at 7a. Moreover, before DeLong was terminated, in an unmistakable separate attempt to nullify DeLong's threat to their artificial pricing, Washington Mills and BCS made an unusual joint visit to Columbus, Georgia, to persuade Pratt to buy "special" media direct from Washington Mills at an inflated price. Pet. App. at 15a-16a.[5] After that visit, Petitioners reported that they felt "secure for at least three years unless Delong [sic] does not play the game."[6] Pet. App. at 15a; Tr. 991-98; Exh. P-194.

---

[4] Among other details, "Washington Mills did not report [the kickbacks] to the I.R.S. on a Form 1099." Pet. App. at 7a.

[5] These direct sales of generic media at the special price continued to provide a "pad" from which Washington Mills paid kickbacks to BCS on all sales, again by express agreement between BCS and Washington Mills. Pet. App. at 10a, 15a-16a.

[6] See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 766 (1984) (maintaining prices, and terminating distributors who sold at prices below those of complying distributors, were "the rules of the game").

ARGUMENT

I. PETITIONERS REQUEST REVIEW OF QUESTIONS NOT SUPPORTED BY THE FACTS, AND MISREPRESENT THE FACTS OF RECORD.

This case poses no reason to reexamine the definition of per se vertical price fixing. These facts pose no danger that the antitrust laws will be applied in such a way as to curb beneficial competition. *Cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 125 L.Ed.2d 168, 186-87 (1993). If Petitioners mean to argue that application of the per se rule against price fixing would somehow stifle competition, they must be thinking about another case. Petitioners concede this record shows absolutely no justification for their price fixing; the jury rejected every possible market justification, after hearing all conceivable arguments. Pet. at 5, n.4.; see also Pet. App. at 16a. In short, this is not the case in which to abandon the traditional rule that "vertical price restraints are illegal per se." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720 (1984).

Moreover, the Petition misrepresents the facts of record.[7] The sheer number and importance of these errors suggests that this Petition is not a proper vehicle for review of any issue. Pursuant to this Court's standing instruction in Rule 15.1, DeLong corrects material facts misstated by Petitioners.

Most obviously, Washington Mills misrepresents the record when it claims there was no "proof, of any manufacturer-distributor agreement on the latter's *resale* prices." Pet. at 1 (emphasis in original); see also first Question Presented. The Eleventh Circuit found otherwise, as a matter of fact. Pet. App. at 15a, 24a, 26a. The ar-

---

[7] These factual misstatements may be explained because counsel of record for Petitioners entered this case only for purposes of this Petition, and did not try this case.

tificial wholesale price of special media (85 cents per pound) was nearly double the wholesale price of identical stock media (49.5 cents), and well above the prevailing consumer (resale) price for identical stock media (66 cents). The inevitable result of the price fix of "special" media was to increase the price to Pratt as well, as Washington Mills' witnesses conceded at trial. Tr. 783, 2054, 2210-11. Raising wholesale prices was one among many devices Petitioners used to maintain the "special" price charged to Pratt.

As an expert economist testified, the price-pegging scheme allowed BCS to disguise a similar artificial price already charged to Pratt in its New England manufacturing plants, for the same product. Washington Mills and BCS shared a "compelling interest" in the Pratt price, specifically to keep the Georgia price the same as that in New England. Tr. 1895-96. BCS had an interest in raising DeLong's price because it could not compete at a market driven price. Tr. 1897-98. Petitioners therefore entered into a plan to inflate the Georgia resale price which DeLong necessarily had to charge. Tr. 1903. This scheme's "eventual effect was to increase the retail price to Pratt in Georgia . . . and to retain therefore the retail price in the New England Pratt plant." Tr. 1898. Forcing up prices "at the wholesale price level was the mechanism by which this retail price was maintained." Tr. 1947.

The Eleventh Circuit explicitly found that the conspirators' wholesale price manipulation to shore up the retail price was "the equivalent of resale price maintenance." Pet. App. at 24a.

Washington Mills' second Question Presented erroneously asserts a "lack of proof of harm to market competition." This conspiracy, including Washington Mills' price-shielding termination of DeLong, forced Pratt to pay higher prices. "Washington Mills evidently chose to combine with one of its dealers to eliminate price competition

in the market for media sales to Pratt." Pet. App. at 26a-27a. Price restraint is "classic" anticompetitive effect. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990).

Petitioners' second Question also asserts erroneously that DeLong suffered no injury because it had alternative available sources of supply. The Eleventh Circuit addressed the same factual argument and concluded DeLong suffered injury in fact: "DeLong was at a disadvantage in bidding for the Pratt business since it could not offer Washington Mills media." Pet. App. at 23a.[8]

Beyond these factual misstatements—upon which Petitioners' requests for review depend—Petitioners also misrepresent the record in other important respects which militate against review:

— Petitioners take issue (Pet. at 5. n.4) with the Eleventh Circuit's factual finding that "Pratt, in other words, was duped." Pet. App. at 6a. But the record conclusively shows Pratt was duped into believing that only "special" media would satisfy its needs, and that it was buying "special" media for which it needed to pay a "special" price. Petitioners rely upon an internal report issued by Pratt long before completion of discovery and trial in this action. Petitioners do not disclose to this Court that Pratt's chief buyer conceded at trial that Pratt's purchasing system was vulnerable. Tr. 590. Further, he concluded the internal investigative report was not worth the paper it was written on. Tr. 393.

---

[8] The Court of Appeals explicitly addressed Washington Mills' erroneous proposition that DeLong could have made up all lost sales with other brands, and considered all evidence cited, including testimony by DeLong's expert economist in response to qualified hypothetical questions on cross-examination. Pet. App. at 20a-21a. The Court of Appeals found ample evidence to support the verdict "reject[ing] the 'possibility' that DeLong could compete effectively by simply getting Pratt to approve alternative products." Pet. App. at 21a.

— Petitioners maintain that they joined the conspiracy only after BCS's overtures to DeLong, and that the Eleventh Circuit so found. Pet. at 4. To the contrary, "it was the Washington Mills sales representative, Peter Ford, who arranged the meeting between Robert Biebel of BCS and Harold DeLong." Pet. App. at 15a.

—Petitioners attempt to make their nondisclosure to DeLong of the Washington Mills "special" designation and price appear routine and innocent. Pet. at 3-4. But Washington Mills' delay prevented DeLong from bidding on a blanket order from Pratt (won by BCS) which satisfied Pratt's needs for an entire year. The Eleventh Circuit found Washington Mills' delay a crucial evidentiary fact complementing the evidence of Petitioners' price manipulation and supporting the jury's finding that Petitioners participated with BCS in a price fixing conspiracy. Pet. App. at 15a.

— The Court of Appeals also found, contrary to Petitioners' representations (Pet. at 4, n.3), "at least by September 1, 1983, DeLong had been approved as a vendor by Pratt." Pet. App. at 29a.

— Petitioners attempt to leave the impression that this is nothing more than a case of price discrimination against one dealer, by erroneously reciting that the conspirators "set a new wholesale price (for DeLong)." Pet. at 4. The Eleventh Circuit correctly noted that the conspiracy raised "prices to other distributors, including the plaintiff." Pet. App. at 2a; see also Pet. App. at 24a ("DeLong or any other distributor").

—Petitioners attempt to attribute the word "kickback" to Respondent alone. But the Eleventh Circuit adopted the word as its own. See, *e.g.*, Pet. App. at 16a, 30a.

These errors are quite sufficient reason to deny certiorari.

II. PETITIONERS' PER SE ISSUE IS NOT WORTHY OF REVIEW.

Petitioners' principal issue is no more worthy of review now than it was three years ago. "[T]here has been no intervening change in the law since *DeLong II* was decided." Pet. App. at 18a.[9]

A. Because Petitioners Had No Economic Justification for Fixing Prices, This Case Offers No Reason To Consider Abandoning the Per Se Prohibition Against Price Fixing.

Petitioners engaged in a raw price fixing conspiracy. They conspired with BCS to set the price to others, not the arm's-length price between themselves which is an "inevitable" but lawful "fixing" of prices. 8 P. Areeda, *Antitrust Law* at 316 (1989); Pet. App. at 25a; *cf.* Pet. at 12. Washington Mills and BCS set the wholesale price of media going to other distributors for resale to Pratt; and thereby pegged the *resale* price of BCS and all others, at or near the artificial price BCS charged Pratt in New England.

Petitioners cannot contend (although they tried to do so at trial) that their artificially high wholesale and resale prices were justified by any economic reason. As Petitioners' own expert conceded, all other things being equal, a manufacturer wants its distributors' resale prices to be low enough to meet competition. Tr. 2174. As Respondent's economist testified, no dealer service justified this price increase. Competitive market prices provided sufficient incentive for distributors to provide quality services to media customers, out of their standard profit margin, without any price support. Expert testimony

---

[9] Respondent follows the lead of the Eleventh Circuit in referring to that court's 1989 decision, Pet. App. at 48a-87a, as "*DeLong II*." The appellate decision after verdict is *DeLong III*.

showed this market does not require a premium price to protect "quality dealers." Tr. 1903.

Washington Mills nonetheless suggests (Pet. at 24) that the kickbacks to BCS (and therefore the huge artificial price forced upon Pratt) were justified economically as a way of preventing DeLong from "free-riding" on development work by BCS to help Pratt choose and test appropriate media. Washington Mills hints that BCS lost a vested interest in the Pratt account, and that DeLong's free riding became a reality, when BCS allegedly was unable to compete in the new southern market.

The suggestion is utterly without factual basis, from every perspective. BCS was not prevented from competing for Pratt's southern business. BCS could have established a separate local warehouse to meet Pratt's needs, as did DeLong. Pet. App. at 53a. A principal of BCS admitted they could have taken shipment from Washington Mills' southern facility, as DeLong did. Tr. 1331-32.

Moreover, BCS had been paid for its development work on Pratt media, on a piece rate basis. Exhs. P-971, 1007, 1503, 1508; Tr. 1291-1341. BCS therefore did not need to make sales, or be paid kickbacks, to recoup its investment. Even if not already paid for its services, BCS had no vested interest in recouping its developmental costs through sales or otherwise. As BCS conceded and expert testimony confirmed, loss of future sales after investment in development is simply one of the risks of being a distributor, for which no compensation by the manufacturer is economically rational. Tr. 1204-06, 1209, 1297-09; 1999-2000. The jury found, the Eleventh Circuit affirmed, and Petitioners concede (Pet. at 5) that no justification supported these artificial prices.

Petitioners analogize to decisions of this Court and other courts which decline to forbid vertical *nonprice* restraints per se. See, *e.g.*, *Business Electronics*, *supra*; *Carlson Mach. Tools, Inc. v. American Tool, Inc.*, 678 F.2d 1253

(5th Cir. 1982). But Petitioners restrained prices, nothing else.[10] As DeLong's expert economist testified, doubling of price was incredible. Tr. 1955, 1956. The extraordinary wholesale and resale prices attached to "special" media were a classic, raw, unadulterated price fix.

B. *Petitioners Present No Important Question of Law Which Should Be Resolved by This Court.*

This case does not present frontier antitrust law. As this Court noted just last year, "[n]o antitrust offense is more pernicious than price fixing." *FTC v. Ticor Title Ins. Co.*, 504 U.S. ___, 119 L.Ed.2d 410, 426 (1992).

Strikingly, nowhere do Petitioners argue that this case raises special and important issues worthy of expenditure of this Court's limited resources for plenary review. Supreme Court Rule 10.1. Petitioners' "Reasons for Granting the Petition," as to each Question Presented, are only that "the Court of Appeals incorrectly found" for Respondent. This is not enough to justify certiorari. "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974).

Nor do Petitioners suggest that any conceivable error in the lower court decision is of transcending importance.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. "Special and important reasons" imply

---

[10] Petitioners offer not a shred of evidence to support the notion theirs was a nonprice restraint. Washington Mills did not use nonprice restraints such as territorial restrictions nor exclusive franchises. Pet. App. at 5a.

> a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Mem. Park Cem., Inc., 349 U.S. 70, 74 (1955) (dismissing certiorari as improvidently granted). The kind of consensual price fixing engaged in by Petitioners is unlikely to recur with sufficient frequency to make their per se liability issue worthy of review, even if "intellectually interesting."

This case does not even pose the principal issue Petitioners would argue. Resale prices were at the heart of Petitioners' conspiracy, as the evidence showed and the Court of Appeals found numerous times. "[W]hen the realities of the market and the record facts indicate that it has occurred . . ., theory will not stand in the way of liability." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. at ___, 125 L.Ed.2d at 190.

Washington Mills seized a "window of opportunity" to charge higher prices *to Pratt*, as its president and controlling stockholder conceded. Pet. App. at 23a. As an expert economist testified, the inflated wholesale price charged for generic media labelled "special" forced the resale price at or above the price BCS was charging Pratt, disguising BCS's supercompetitive prices.[11] "[I]t was critical, absolutely critical for . . . BCS and Washington Mills, not to allow a price in Georgia to be as low as 66 cents." Tr. 1902; see also Tr. 1893-96, 1898, 1946, 1948. Thus the conspiracy was doubly concerned with resale prices. It not only inflated the price to Pratt in Georgia, but did so for the purpose of matching BCS's artificial price to Pratt in New England.

---

[11] Paradoxically, Petitioners attempt to argue against a per se price-fixing conspiracy on the grounds that the effective wholesale price to BCS was not raised when "Washington Mills specials" were created, because of the kickbacks to BCS. Pet. at 13, 20. The contention is mystifying, given Petitioners' overall argument that only resale price fixing matters. Petitioners ignore the patent increase in resale price.

The resale price hike forced by the conspiratorial increase in wholesale prices was only one means by which resale price was maintained. Before announcing Washington Mills "specials" with their inflated price, Washington Mills maintained the price simply by withholding from DeLong the product and price information it needed in order to compete for Pratt's business. Later, when DeLong's resistance threatened that part of the pricing scheme effected by wholesale pricing, Washington Mills and BCS cut out DeLong and propped up the price to Pratt by making direct sales to the Georgia plant, and then Washington Mills terminated DeLong as a distributor. This was undeniably a conspiracy over resale prices.

Petitioners argue that the Eleventh Circuit's decisions are either confused and ambiguous concerning wholesale versus resale prices; or flatly erroneous, in overlooking the significance of resale price. But the Eleventh Circuit was neither confused nor oblivious to resale issues. Its opinions confirm repeatedly that Petitioners' scheme was by nature a conspiracy over resale price:

> [T]he alleged conspiracy to restrain competition here was "to fix prices of media sold to Pratt by designating ordinary media as 'special' media and selling it at an artificially inflated price *to Pratt*."

Pet. App. at 18a, 56a (emphasis supplied).

> [T]he essence of the alleged conspiracy . . . was to inflate the price of the manufacturer's standard product by labeling it "special" and "charging Pratt . . . a significantly higher price than Washington Mill's list price for [the] identical [product]."

Pet. App. at 2a-3a; Pet. App. at 64a; see also Pet. App. at 16a ("Washington Mills and BCS conspired to fix the price of Washington Mills media both to DeLong and to

Pratt under the fraudulent cover that the generic media was 'special' "); Pet. App. at 26a ("here we have . . . an agreement between Washington Mills and BCS to inflate all distributors' end price of products destined for one large customer by eliminating price competition at the dealer level.").

Petitioners confuse the relationship between wholesale and retail prices, arguing that their conspiracy simply could not have been about resale prices because the kickbacks to BCS were *measured* according to the wholesale price. Pet. at 8, 22.[12] But surely the measuring stick by which the kickback amounts were calculated is irrelevant to the conspirators' ultimate purpose to affect resale prices. Moreover, to the extent any mathematical relationship is important, the kickback amounts are inextricably linked to resale price. Washington Mills' standard price list, reflecting the industry standard, shows retail price as the list price,[13] from which a 25% dealer discount is deducted to arrive at wholesale price. Pet. App. at 6a. Thus the customary resale price is a mathematical function of wholesale price. Petitioners' "padding"[14] of the wholesale price effected a corresponding and larger increase in resale prices. Even though figured as a percentage of wholesale prices, the kickbacks served to peg the resale price as well. Pet. App. at 24a ("Price fixing at the wholesale level, as testified to by a DeLong expert economist, was the mechanism by which the retail price was maintained.").

---

[12] The conspiracy was evidenced by the singularly unjustified kickbacks to BCS, which the conspirators testified were calculated to return BCS's price to its original price, to the half-penny (49.5 cents per pound). Pet. App. at 9a.

[13] As a formal matter, Washington Mills' "list" price is defined as its price to nondistributor customers. But in practice, this is also the suggested retail price for distributors. Tr. 163.

[14] Pet. App. at 17a, 19a, 70a, 72a, 76a.

Finally, Petitioners charge Respondent with sowing confusion through its claims presented to the jury, and blame the trial judge with error in declining to deliver jury instructions requested by Washington Mills. But the trial court made no error. The only confusion in this case is created by Petitioners' own doctrinal confusion, which still persists through this Petition.

Petitioners equate vertical agreement over price and the specialized notion of "resale price maintenance." But the latter is a term of art for a special kind of vertical price restriction, "by which a seller of goods attempts to set the price at which his buyer resells the goods to a second buyer." *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1222 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988). Resale price maintenance is merely "*a form* of vertical price fixing." *Id.* (emphasis supplied). These facts show much more than manufacturer-coerced prices. "BCS and Washington Mills agreed on the price-fixing scheme." Pet. App. at 7a.

Petitioners' theoretical confusion is manifested in their procedural confusion. In their earlier Petition for Certiorari, they argued that the Court of Appeals overlooked both the resale price issue generally and their alleged resale price maintenance requirement specifically.[15] After remand, Washington Mills asserted as controlling law "the Eleventh Circuit's apparent belief that this case could be fit into the mold of resale price maintenance." Pet. at 9. Petitioners tried to insist that this case be tried on a resale price maintenance theory or not at all.

Consistent with this approach, Petitioners submitted three jury instructions each of which would have straightjacketed the jury to considering only Petitioners' resale

---

[15] Petitioners argued: "What the Court of Appeals ignored, however, is that the 'agreement on price or price levels' referred to in *Business Electronics* is an agreement regarding the *resale price to be charged by a distributor* . . . ." Petition for Certiorari in No. 89-1362, at 10 (emphasis in original).

price maintenance theory.[16] More tellingly yet, in its exceptions to the charges, Washington Mills objected only to the trial court's decision not to charge concerning resale price maintenance.[17] The trial court committed no error in declining charges which reflected neither the facts of this case nor the law of per se price fixing.[18]

Washington Mills now contends that the result of the trial court's proper rejection of its irrelevant charges was to remove the resale price issue from the jury. But Washington Mills waived any objection by failure to offer a suitable jury charge. More importantly, as the Eleventh Circuit said in both *DeLong II* and *DeLong III*, the conspiracy between Washington Mills and BCS is unexplainable *except* as a scheme to fix resale price to Pratt. See *e.g.*, Pet. App. at 24a, 64a. Plaintiff necessarily demonstrated a resale price conspiracy, as those decisions establish.

---

[16] Notably, although Petitioners would have this Court involve itself in specific jury instructions, Petitioners entirely omit to reproduce the instructions they requested at trial. So that the Court may appreciate the precise nature of the requested charges, and their limitation to a single irrelevant theory of price fixing, Respondent reprints Defendants' Requests to Charge Nos. 16, 17 and 18, as an Appendix to this Brief in Opposition.

[17] Washington Mills excepted as follows: "[T]hey have to establish some agreement between Washington Mills and BCS, the non-terminated dealer, as to the particular price or price level that BCS would charge on resale." Tr. 2490.

[18] The district court also noted at the charge conference that Respondent's claim was "that there was an agreement between Washington Mills and BCS to set the price of media sold to DeLong so that the price would be of such a level that it would protect the price being charged by BCS to Pratt . . . ." Tr. 2313. The charge conference colloquy recited by Petitioners (Pet. at 11) is thus understandable in that "the district judge at the charging conference declined to give the instruction requested by Washington Mills on resale price maintenance." Pet. at 19.

Consistent with the Eleventh Circuit's direction (and later affirmance), the trial court instructed the jury that Petitioners' conspiracy necessarily was over resale price. The district court described the alleged conspiracy to the jury as follows:

> [Defendants] combined and conspired to fix the price of preformed ceramic tumbling media which was sold to DeLong Equipment Company. . . . , thereby justifying the maintaining of a high price being charged to Pratt & Whitney by BCS.

Pet. App. at 90a. In sum, this case does not present Petitioners' issue. Fixing resale prices was the purpose of their conspiracy. Raising the wholesale price to DeLong and other distributors was only one means they used toward that end. The trial court and the Court of Appeals both found that Petitioners fixed resale prices.

C. *Application of the Per Se Rule Is Consistent With the Decisions of This Court and the Courts of Appeals.*

The Sherman Act forbids per se any "agreement . . . 'formed for the purpose and with the effect of raising' the price." *Palmer v. BRG of Georgia*, 498 U.S. 46, 48-49 (1990) (citations omitted). Naked vertical price fixing ("concerted action to set prices") like that engaged in by Petitioners "ha[s] been per se illegal since the early years of national antitrust enforcement." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984), citing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400, 404-09 (1911). No subsequent decision of this Court has shaken or varied this fundamental proposition.

Dr. Miles held that resale price maintenance amounts to a vertical price conspiracy, but did not hold that a vertical price conspiracy must entail resale price maintenance. No decision of this Court holds that price fixing is

a per se violation only in cases of "resale price maintenance."

The Sherman Act permits manufacturers to act independently to influence resale prices, by posting prices and simply refusing to deal with buyers who do not honor them. *United States v. Colgate & Co.*, 250 U.S. 328 (1919). The phrase "resale price maintenance" was coined to describe coercive action to set resale prices which goes beyond these steps permissible under *Colgate*. "[B]y virtue of concerted action induced by the manufacturer," the manufacturer may become "the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act." *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47 (1960). See also *Albrecht v. The Herald Co.*, 390 U.S. 145, 151 n.8 (1968) (rejecting the argument "that there can be no agreement violative of § 1 unless that agreement accrues to the benefit of both parties").

Resale price maintenance created by manufacturer coercion is not the only per se unlawful vertical price fixing "combination." Even more obviously, permissible unilateral action is absent when the manufacturer and one or more distributors agree voluntarily on prices. "[A]n unlawful combination . . . arises from a price maintenance *agreement*, express or implied." *Parke, Davis*, 362 U.S. at 43 (emphasis in original); see also *Monsanto*, 465 U.S. at 761 ("there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts"). "Congress has closely patrolled [vertical] price fixing whether effected through resale price maintenance agreements or otherwise." *Simpson v. Union Oil Co.*, 377 U.S. 13, 17 (1964) (price-coercive consignment of goods same as resale price maintenance).

Petitioners suggest that the Eleventh Circuit's decision is inconsistent with *Business Electronics* and *Monsanto*. But neither decision holds that resale price maintenance is the only set of facts which may give rise to a per se

vertical price conspiracy. Indeed, the facts of *Monsanto* do not fit the mold of "resale price maintenance" as defined traditionally and by Petitioners. Just as in this case, one or more dealers combined with the manufacturer voluntarily to decide on their own prices and prices to be charged by competing dealers. This Court found per se unlawful vertical price fixing. *Monsanto* "addressed the evidentiary showing necessary to establish vertical concerted action." *Business Electronics*, 485 U.S. at 726. The jury and the Eleventh Circuit found ample such evidence here. Pet. App. at 3a-10a, 13a-16a.[19]

Petitioners argue, consistent with their narrow "resale price maintenance" theory, that "there can be no agreement on DeLong's prices unless DeLong is a party to it." Pet. at 20. But *Monsanto* found a vertical price conspiracy where a price-cutting dealer did *not* agree on price. Indeed, just as here, the lower-price dealer was terminated for trying to reduce resale prices.

Business Electronics held "that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels." *Id.* at 735-36. As DeLong has shown and the Eleventh Circuit found, Petitioners' conspiracy was over "price or price levels," wholesale and resale. Pet. App. at 18a, 24a, 61a n.11.

Notably, *Business Electronics*, in requiring "agreement on price or price levels," does not require resale price maintenance as an element of a vertical price conspiracy.[20]

---

[19] Washington Mills' continued reliance upon *Business Electronics* is consistent with its earlier characterization of this litigation as nothing more than "a dealer termination case under Section 1 of the Sherman Act." *DeLong II* correctly rejected that characterization, noting the voluminous evidence of a vertical price conspiracy. Pet. App. at 60a-61a.

[20] Moreover, the *Business Electronics* "agreement on price or price levels" requirement does not require agreement on resale prices. This case, where resale price conspiracy is unequivocal, raises no issue as to conspiracy over wholesale price alone.

Petitioners conspired to maintain resale prices, even if they did not engage in "resale price maintenance" as traditionally and narrowly defined.[21]

The Sherman Act condemns per se all *collusive* agreements between a manufacturer and a distributor to fix prices, including those which (unlike "resale price maintenance") do not dictate a specific price.

> Of course, if a price-fixing agreement can be found between the manufacturer and some particular dealer, such as one who complained about the discounts of a dealer who was terminated in response to such complaints, the absence of any specific resale price would not save the manufacturer.

8 P. Areeda, *Antitrust Law*, ¶ 1625 at 307 (1989) (citing *Business Electronics*);[22] see also *id.*, ¶ 1627 at 320 (condemning *unilateral* price restrictions imposed by the man-

---

[21] DeLong's expert economist testified: "As an economic matter, I found behavior very similar with almost exactly the same results, although it is not the exact situation as resale price maintenance as I've outlined." Tr. 1887. "I see in this case essentially no difference. . . . The end result is the same." Tr. 1898. "To the extent that the wholesale price increase made it impossible to maintain the previous retail price and set clear limits under which the retail price could not drop, it has the same economic effects." Tr. 1945-46.

[22] The absence of an agreed specific price is irrelevant to whether BCS and Washington Mills conspired to peg BCS's price.

> An agreement to pay or charge rigid uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used . . . . They are fixed because they are agreed upon.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940). See also *Palmer v. BRG of Georgia*, 498 U.S. 46, 48 (1990), quoting from *Socony-Vacuum* ("a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se.").

ufacturer which are "the functional equivalent of resale price agreement.")[23]

Washington Mills fares no better in its attempt to paint the Eleventh Circuit's per se ruling as in conflict with any decisions of other Circuit Courts. None of the decisions cited by Washington Mills stands for the proposition that resale price maintenance is an indispensable element of a vertical price conspiracy. Three of those decisions involved no price restraint.[24] The remaining four decisions cited by Washington Mills ruled against resale price maintenance claims because the seller exercised no coercive power creating a Sherman Act "combination."[25] Several of the cited

---

[23] Petitioners note that a supplement to Professor Areeda's treatise criticizes the result in *DeLong II*, from which this Court earlier denied certiorari. As *DeLong III* noted, however, "The supplement's analysis of . . . *DeLong II* . . . is not up to that well-known treatise's customary high standards." Pet. App. at 25a. Moreover, in discussing a Massachusetts district court decision, the treatise's 1992 supplement appears to contradict the entire premise of this Petition: "[P]otentially reasonable arrangements are not impaired by classifying as resale price maintenance an agreement to terminate one dealer because he refuses to charge a particular price, especially a price set by his rival." See P. Areeda, *Antitrust Law* ¶ 1625'd (1992 Supplement).

[24] *Seaboard Supp. Co. v. Congoleum Corp.*, 770 F.2d 367, 373-75 (3d Cir. 1985); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 886 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 256 (3d Cir. 1984) ("the per se rule applies to 'an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves.' ") (citation omitted).

[25] *Butera v. Sun Oil Co.*, 496 F.2d 434, 437 (1st Cir. 1974) ("Sun has done nothing, and has threatened nothing, contingent on Butera's adherence to the suggested resale price."); *Lewis Serv. Ctr., Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845 (8th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) ("Mack neither directly nor indirectly fixed the price at which Lewis ultimately sold its trucks"); *Sun Oil Co. v. Vickers Ref. Co.*, 414 F.2d 383, 390 (8th Cir. 1969) (no "intent to fix prices or proof that the agreement actually did fix prices"); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982),

cases challenged, as anticompetitive, price discounts offered to either volume sellers or sellers involved in local price wars, or both. In each instance, the lower courts found not only a lack of price coercion, but also market-tailored competitive justification for the challenged discount.[26] Washington Mills did not justify the kickbacks to BCS based on volume[27] or local price wars. This jury rejected every proffered justification for the kickbacks.

No economic justification supported Petitioners' conspiracy or combination to fix prices. The Eleventh Circuit's decision does not conflict with decisions of this Court or other Circuits.

III. PETITIONERS' ANTITRUST INJURY ISSUES DO NOT MERIT REVIEW.

Washington Mills terminated DeLong's distributorship pursuant to a conspiracy to fix prices, in order to protect the artificially inflated price. Pet. App. at 16a, 25a, 72a, 77a. "DeLong made no further sales of preformed ceramic media to Pratt after its termination." Pet. App. at 21a. The jury compensated DeLong for sales lost as a result of termination of its Washington Mills dealership, making appropriate discounts for sales which would have been made by other dealers, and for sales DeLong itself could have made using alternative media. Pet. App. at 32a-37a. Compensable antitrust injuries include profits on sales which are lost because of distributor termination, whether pursuant to a vertical price-fixing conspiracy, *Monsanto*, 465 U.S. at 765-68; or in furtherance of resale price main-

---

cert. denied, 461 U.S. 919 (1983) ("Here, no coercion was present."); see also *Pennsylvania Dental Ass'n v. Medical Serv. Ass'n*, 745 F.2d 248, 259 (3d Cir. 1984) ("would have to be evidence of some collaboration or coercion to find an unlawful price-fixing agreement").

[26] *Butera*, 496 F.2d at 438; *Lewis*, 714 F.2d at 847; *AAA Liquors*, 705 F.2d at 1207-08.

[27] Washington Mills offered a "standard distributors' discount of 25% off its retail price." Pet. App. at 6a.

tenance, *Simpson v. Union Oil Co.*, 377 U.S. at 15-16; or other loss of product supply, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Eastman Kodak Co. v. Southern Photo Mats. Co.*, 273 U.S. 359 (1927).

Although Petitioners' scattershot Question Presented purports to challenge the Eleventh Circuit's finding of antitrust injury on no fewer than three grounds, the essence of their challenge is that the jury simply awarded too much.[28] But once the fact of damage is shown, antitrust juries are allowed considerable freedom in estimating the amount of damages, as established by a long line of this Court's decisions, most recently in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 572-73 (1990). " 'Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights." *Bigelow*, 327 U.S. at 265-66 (citations omitted). The Eleventh Circuit specifically affirmed the jury's measure of Sherman Act damages. Pet. App. at 31a-37a. The court's discussion explicitly takes account of all the facts supporting a projection for "the life of the Columbus plant" (Pet. App. at 32a), including the market life of the jet engine blades for which the media were used, the business life expectancy of DeLong, and its history of keeping customers. *Id.*

Not one of the three issues formally raised by Petitioners[29] warrants this Court's grant of review, for a

---

[28] Starting with the Questions Presented and throughout the brief, Petitioners object to the jury's well-substantiated choice of a 34-year projection period from DeLong's termination for Pratt's usage of preformed ceramic abrasive media, and DeLong's participation in that market. But these and all other facts supporting the jury's award are substantiated by the record, as the Eleventh Circuit appropriately found. Pet. App. at 32a, 36a.

[29] Notably, Petitioners abandon here the principal "antitrust injury"

host of reasons. Most obviously, Petitioners' arguments are not significant because they depend upon erroneous notions of the facts of this case.

A. *DeLong's Lost Profits "Flow From That Which Makes Petitioners' Conduct Unlawful."*

Petitioners' arguments to the contrary notwithstanding, DeLong's injury clearly "flow[ed] from that which makes defendants' conduct unlawful." The conspirators' unlawful conduct was pegging prices. As an integral part of that conspiracy, Washington Mills terminated Respondent's distributorship because of DeLong's active threat to the success of the conspiracy. The record leaves no doubt that DeLong was terminated because of the conspiracy; the jury necessarily found that all other reasons offered to justify termination were mere pretexts. Pet. App. at 10a. DeLong's termination flowed from Petitioners' price-fixing scheme. This Court is not the place to retry or reargue issues of fact resolved by the jury and affirmed by the Court of Appeals. See *e.g.*, *United States v. ITT Cont. Baking Co.*, 420 U.S. 223, 226-27 n.2 (1974); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951).

The decision below is consistent with this Court's leading decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). DeLong's injury satisfies the *Brunswick* requirement that losses be incurred "by reason of anything forbidden in the antitrust laws." *Id.* at 488. Washington Mills terminated DeLong's distributorship as part of their price fixing conspiracy.

> Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no ques-

---

argument they made in the Court of Appeals. In that court, Petitioners argued that DeLong was merely trying to take advantage of the conspiratorial price established by Petitioners. But DeLong sought to reveal that price as artificial and open the market to competition (and was terminated as a result). Pet. App. at 22a.

> tion but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick*. . . .

Blue Shield of Virginia v. McCready, 457 U.S. 465, 479 (1982).

DeLong III is also consistent with this Court's decision in *Atlantic Richfield Co. v. USA Petro. Co.*, 495 U.S. 328 (1990) ("*ARCO*"). The issue decided in *ARCO* was narrow: "This case presents the question whether a firm incurs an 'injury' within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme." *Id.* at 331. *ARCO* decided that a buyer *which continues to resell* may not recover damages from sales lost in competing against nonpredatory prices. *Id.*; see also *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Here, Washington Mills prevented Respondent from competing as to price, and propped up prices, by terminating DeLong's Washington Mills distributorship as part of the conspiracy. Pet. App. at 22a. Contrary to Petitioners' argument, DeLong's injury "corresponds to the rationale for finding a violation in the first place."

Confusingly, Petitioners inject the distinction between per se and rule of reason liability into their antitrust injury discussion as well. Petitioners erroneously assert that *Business Electronics* and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), establish a new principle, that lost profits resulting from distributorship termination are excluded categorically from consideration as antitrust injury in a per se case. But those cases merely hold that dealer termination without price agreement is not a per se violation. In *Monsanto*, which was decided since *GTE Sylvania*, termination (as here) was the result of a per se vertical price-fixing conspiracy. This Court affirmed a ver-

dict awarding post-termination lost profits as antitrust injury.

The decision below is also consistent with, and not affected by, the result in *Anago, Inc. v. Tecnol Med. Prods., Inc.*, 976 F.2d 248 (5th Cir. 1992), *petition for cert. pending*. *Anago* denied antitrust standing to a merger takeover target where, as Petitioners explain, "it was the merger, not the anticompetitive character of the merger, that caused the injury (future inability to compete)." Pet. at 27. On the facts of this case, however, there can be no doubt that "it was the anticompetitive" (price fixing) nature of Petitioners' conspiracy "that caused [DeLong's] future inability to compete."[30]

B. *DeLong's Injury Reflects Anticompetitive Effects.*

Petitioners argue that DeLong suffered no antitrust injury because its injury was not related to anticompetitive effects. But the result of DeLong's termination was to maintain the artificial price of "special" media. BCS and Washington Mills disguised that price by removing DeLong's continuing threat to expose their price fixing.

> [T]he evidence supported DeLong's assertion that it was an obstacle to the continuation of the scheme between Washington Mills and BCS to

---

[30] Petitioners' argument for "temporal mismatch" is misplaced. Neither *ARCO* nor any other decision requires antitrust injury to be simultaneous with unlawful conduct. Nor is continued competition among the parties necessary to show antitrust injury. *Simpson v. Union Oil Co.*, 377 U.S. at 17. "The fact that Washington Mills has in fact lost the Pratt media business is, at most, an indication that its overcharging and fraud preempted its participation in future sales." Pet. App. at 37a. Petitioners' arguments reflect outmoded and discarded notions of proximate causation. W. Prosser & W. Keeton, *Torts*, § 43 at 282-83 (5th ed. 1984). DeLong's future lost profits "flowed from" the price fixing scheme just as surely as any other losses attributable to the conspiracy.

> "pad" the Pratt price, and that DeLong was terminated to remove that obstacle.

Pet. App. at 19a; see also Pet. App. at 16a, 72a. Petitioners' second argument, like their first, is unsupported by the facts as found by the jury and affirmed by the Court of Appeals.

Despite this classic anticompetitive effect upon prices, the Petition urges early and often that Respondent did not show any anticompetitive effect, and that the decision below transgresses *ARCO* for lack of a showing of such effects. Petitioners' erroneous support for this proposition is DeLong's brief in *DeLong II*, which admitted the market showing in this record would not support (but did not have to support) a rule of reason violation. Pet. App. at 60a. DeLong categorically did not concede that Petitioners' scheme had no anticompetitive effect. Their per se unlawful price-fixing had anticompetitive effects.

> As a matter of law, the absence of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anti-competitive character of such an agreement."

NCAA v. Board of Regents, 468 U.S. 85, 109 (1984) (citation omitted). Price hikes resulting from per se price fixing are anticompetitive effects, no less than the anticompetitive effects upon an entire market created by rule of reason violations. *Id.*; see also *Socony-Vacuum*, 310 U.S. at 221.

Petitioners created a "window of opportunity" during which they could charge nonmarket prices. Pet. App. at 23a. To preserve that window of opportunity, Washington Mills terminated DeLong's distributorship. "DeLong's in-

jury was a loss of opportunity to compete." Pet. App. at 21a. This is antitrust injury.

C. *DeLong Suffered Injury In Fact.*

Petitioners next purport to argue that DeLong suffered no antitrust injury because it had alternative sources of supply. The Court of Appeals correctly read Petitioners' argument as contending that Respondent suffered no injury in fact, as opposed to antitrust injury. Pet. App. at 17a; see Petitioners' Court of Appeals brief at 26-28. Injury in fact offers no significant issue for review.

Because DeLong could not make up all its lost sales with other brands, *DeLong III* is consistent with decisions of the Sixth Circuit, in particular *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc.*, 459 F.2d 138 (6th Cir. 1972). *Elder-Beerman* merely found, on the facts of that case, "a lack of independent evidence to establish any factors of uniqueness . . . . The record leaves unanswered the question of the availability of comparable alternative brands." *Id.* at 149. *This* record shows the special competitive advantages of Washington Mills media, creating injury in fact when DeLong was terminated.

IV. CONCLUSION

Because the facts do not support review of the issues pressed by Washington Mills, and because Washington Mills has not satisfied any of the grounds for certiorari, the writ should be denied.

This 12th day of November, 1993.

Respectfully submitted,

WILLIAM E. SUMNER

Counsel of Record

NANCY BECKER HEWES
STEPHEN J. ANDERSON
DAVID A. WEBSTER

SUMNER & HEWES
Suite 700, The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 588-9000

Attorneys for Respondent
DeLong Equipment Company